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No. 86-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES STEEL CORPORATION
and USS, INC.,

Petitioners,

—against—

WILLIAM B. PRYOR, on behalf of himself and a Class of other Shareholders of Common Stock of Marathon Oil Company, similarly situated,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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WILLIAM B. PRYOR, on behalf of himself and a Class of other Shareholders of Common Stock of Marathon Oil Company, similarly situated,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent William Pryor submits this brief in opposition to the petition of petitioners United States Steel Corporation and USS,

Inc. (collectively "USS") for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of the Second Circuit's decision entered on June 25, 1986 upholding as legally sufficient respondent's damage claim under Section 14(d)(6) of the Securities Exchange Act of 1934 ("the 1934 Act"), as amended by the Williams Act in 1968 (15 U.S.C. §78n(d)(6)) ("§14(d)(6)").

COUNTERSTATEMENT OF THE CASE

Respondent, a former shareholder of Marathon Oil Company ("Marathon"), alleged in his complaint filed in January 1982 that USS had wrongfully shifted to late-tendering Marathon shareholders $83

million of the approximately $1.5 billion "control premium" paid by USS to Marathon shareholders to acquire 51% of the shares (and therefore effective control) of Marathon, in accordance with the first tier of USS's two-tier tender offer for Marathon. The first tier involved USS's cash offer to purchase 51% or 30 million shares of Marathon stock at $125 per share -- a price premium that at the time "greatly exceeded the average premium in [then] recent control transactions." Radol v. Thomas, 772 F.2d 244, 249 (6th Cir. 1985), cert. denied, ___ U.S. ___, 106 S. Ct. 3272 (June 23, 1986).[1]

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[1] Mobil Corporation was the contending tender offeror. Its tender offer, whose "premium" exceeded USS's, was prevented by

In the present case, the Court of Appeals held, in an opinion by Judge Winter, that USS violated §14(d)(6) and injured timely-tendering Marathon shareholders by effecting a redistribution of the "control premium" to late-tendering Marathon shareholders through the acceptance into the proration pool of about 3 million Marathon shares tendered by them after the "proration" deadline (Pet. A-9 to A-11). In so holding, the Court of Appeals reversed the ruling of the District Judge (Hon. Mary Johnson Lowe), on USS's motion to dismiss for failure to state a claim for relief under Rule 12(b)(6),

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a successful antitrust challenge. See Marathon Oil Company v. Mobil Oil Corporation, 669 F.2d 366 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982).

Fed. R. Civ. P., that under §14(d)(6) USS could accept late-tendered shares for any reason whatsoever and that, to redress their injuries, injured tendering shareholders had to rely exclusively on contractual remedies, if any, assertable under state law (Pet. B-12 to B-14).

The Court of Appeals further held that timely tendering Marathon shareholders, on whose behalf respondent sues, had an implied damage remedy to recover the amount of the "control premium" lost as a consequence of USS's acceptance of late-tendered shares (Pet. A-11 to A-14).

In the more than four years that the action has been pending, USS has yet to answer the complaint. USS has also successfully resisted any

discovery and has therefore never yet responded to respondent's interrogatories and related document requests served in February 1982 and directed at determining the identities of the late-tendering shareholders, the circumstances of their late tenders and the reason or reasons why USS included these late-tendered shares in the proration pool.

REASONS FOR DECLINING THE WRIT

USS's petition does not present any legal issue which merits review by this Court. The Court of Appeals' reading of §14(d)(6) to prohibit the acceptance of late-tendered shares strictly accords with the plain language of the statute, and is amply supported by explicit

legislative history, as well as by the common and consistent understanding of the financial and the securities bar regarding the operation of §14(d)(6). The Court of Appeals' implication of a private damage remedy finds persuasive support in §14(d)(6)'s language, structure, and legislative history, as well as this Court's recent dictum regarding the "substantive rights" accorded by §14(d)(6) and cognate "substantive" provisions of the Williams Act designed to protect shareholders tendering pursuant to partial tender offers. There is no evidence of any substantial disagreement with the Court of Appeals' holding or even the existence of other litigated cases involving proration issues, much less

one whose resolution would be assisted by Supreme Court review of this case.[2]

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[2] The potential $83 million exposure faced by USS in this case is less formidable than it may seem at first blush. The tender offeror's decision to accept late-tendered shares was a voluntary one. Before making that decision, the tender offeror had the opportunity to obtain indemnity agreements from the late-tendering shareholders who received the benefit of the offeror's decision to accept late-tendered shares and therefore could protect itself fully against any resulting §14(d)(6) liability. Even absent indemnity agreements, the tender offeror may still have rights arising under the 1934 Act or common law for indemnity and/or contribution against the benefitting, late-tendering shareholders. Under these assumptions, the net effect of the tender offeror's §14(d)(6) liability is to pledge its creditworthiness in the event that benefitting late-tendering shareholders fail to make restitution of their ill-gotten gain.

I. THE COURT OF APPEALS CORRECTLY READ §14(d)(6) TO PROHIBIT THE INCLUSION OF LATE-TENDERED SHARES IN THE PRORATION POOL.

USS's contentions regarding §14(d)(6)'s prohibition of the inclusion of late-tendered shares in the proration pool established pursuant to an oversubscribed, partial tender offer are transparently insubstantial. The Court of Appeals' reading of §14(d)(6) to prohibit the redistribution of the "control premium" at the whim of USS accords not only with the plain meaning of the statute, but as well with the common understanding of the securities industry and securities bar and legislative history dealing with the precise situation.

In framing its petition, USS misleadingly defines the §14(d)(6) issue. USS asserts that the "question for decision is whether inclusion in the proration pool of shares timely offered, but the tender of which may not have been perfected in accord with the precise terms" of the tender offer violates §14(d)(6) (Pet., pp. 4-5) (Emphasis added). However, the District Court saw the issue presented differently, framing the question as whether "defendant wrongfully accepted late-tendered shares for proration" (Pet. B-9) and the majority of the Court of Appeals read the complaint to assert that USS "included in the proration pool three million shares that were not timely tendered" (Pet. A-3). (Emphasis

added). Neither the District Court nor the Court of Appeals made any factual finding as to why or under what circumstances these shares were late-tendered, accepting, as they were mandated to, the truth of the complaint's factual allegations.[3]

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[3] USS's factual assertion that the late-tendered shares were "timely offered" is neither alleged by the complaint nor supported in any part of the record. USS's assertion that the District Court so treated the complaint's allegations (Pet., p.5 n.3) is a blatant misrepresentation, for the cited portion of the District Court's decision merely refers to that possibility as one hypothetical explanation for the acceptance of late-tendered shares. In a similar vein, USS also errs in its reliance upon the complaint's reference to USS's December 8, 1981 press release (Pet., p. 4). USS's post-December 8 press releases (Pet., p. 4 n.2) show that the number of tendered Marathon shares decreased by 3 million shares

A. By Its Plain Meaning, §14(d)(6) Prohibits The Acceptance Of Late-Tendered Shares.

Contrary to USS's contention (Pet., p. 11), §14(d)(6) is not "silent" on the question of late-tendered shares.[4] §14(d)(6)'s

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after December 8, 1981 because previously tendering shareholders had apparently withdrawn these shares in order to deposit them in response to Mobil's competing offer which was at a higher price than USS's (Joint Appendix, A-89). Judge Lumbard's dissent, to the extent that it adopted USS's factual contentions, simply misses the mark. The determination of the precise circumstances involved in USS's acceptance of late-tendered shares must await discovery and trial.

4 §14(d)(6) provides as follows:

> Where any person makes a tender offer, or request or invitation for ten-

definition of "pro rata" does not permit the tender offeror, as USS contends, to determine the proration

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> ders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.
>
> (Emphasis added.)

ratio. This definition necessarily excludes late-tendered shares.

The starting point in the analysis is §14(d)(6)'s direction compelling a tender offeror making a partial tender offer to "take up", i.e., purchase, shares on a "pro rata" basis. The relevant phrase of §14(d)(6)'s first sentence directs that "the securities taken up" "shall be taken up as nearly as may be pro rata, disregarding fractions . . .."

The last phrase of §14(d)(6)'s first sentence requires "proration":

> according to the number of shares deposited by each depositor. (Emphasis added.)

The "depositor" and "shares" included in this formula are only those "shares" tendered by those "deposi-

tors" who deposit, in aggregate, "a greater number of securities * * * pursuant thereto [to the tender offer, request or invitation] within ten days after copies of the offer or request or invitation are first published or sent or given to holders than such person [the tender offeror] is bound or willing to take up or pay for." (Emphasis added.)

To justify USS's reading of §14(d)(6), the "proration" ratio would have to be calculated "according not only to the number of shares deposited by each depositor but those of later depositing depositors whose shares are accepted for purchase." (Emphasis denotes amendment required to support USS's reading). However, the only additional shares permitted

by §14(d)(6) to be included in the proration pool are those "deposited", in the words of its second sentence, "within ten days after notice of an increase in consideration offered to security holders . . . is first published or sent or given to security holders." That did not happen here.[5]

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[5] Contrary to USS's contention (Pet., p. 11), Indiana National Bank v. Mobil Oil Corp., 578 F.2d 180 (7th Cir. 1970) merely held that the tender offeror could properly reject late-tendered shares in an oversubscribed partial offer. Indeed, the District Court opinion in that case, which was affirmed, appears to suggest that, since only those shares tendered within the 10-day proration period could be accepted for proration under §14(d)(6), the tender offeror had no choice but to reject the late-tendered shares (457 F. Supp. at 1031-32).

B. The Legislative History Shows That Congress Specifically Sought To Prohibit The Acceptance Of Late-Tendered Shares.

Section 14(d)(6)'s legislative history is best understood in the light of one simple and indisputable fact about partial tender offers: the tender offeror's legitimate needs are fully satisfied once it receives tenders of the number of shares that its tender offer provides that it will purchase. Therefore, in a partial tender offer, the tender offeror has no need to accept late-tendered shares where, as here, the offer is vastly oversubscribed during its first ten days.

The legislative history of §14(d)(6) is well summarized in Bromberg, Securities Law: Fraud, SEC

Rule 10b-5, §6.3 (531) (1969):

> The SEC recommended to Congress that acceptance be pro rata over the whole duration of the offer. * * * * All the security industry representatives disagreed with the SEC. * * * The N.Y.S.E. had long regarded offers without a pro-ration period as "objectionable" and had urged (but not required) its listed companies to take pro-rata from deposits during the first ten-days. * * * This was the pattern Congress made mandatory, with some sharpening of details.[6]

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[6] Hearings were first held in the Senate on the original bill, S.510, 90th Cong., 1st Sess. (1967). The original pro rata provision, Sec. 2(5) of S.510, would have required pro rata purchase of all shares tendered throughout the tender offer. Full Disclosure of Corporate Equity Ownership And In Corporate Takeover Bids: Hearings on S.510 Before the Subcommittee On Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. (1967)

The subject of late-tendered shares arose in a crucial battle

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("Senate Hearings On S.510"). The bill, with material changes in the proration provision discussed hereinafter, was reported favorably by that committee. Senate Committee on Banking and Currency, Full Disclosure of Corporate Equity Ownership and In Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. (1967) ("S.Rep. No. 550").

Hearings were held by the House on an amended version of S.510, during which Sec. 2(5) was amended to provide for a limited 10-day proration period and for extension of proration period in the event the offer price was increased. Takeover Bids: Hearings on H.R. 14475 and S.510 Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968) ("House Hearings on H.R. 14475 And S.510"). The House Committee recommended that S.510 (as amended) be adopted. House Committee On Interstate And Foreign Commerce, Disclosure of Corporate Equity Ownership, H.R. Rep. No. 1711, 90th Cong., 2d Session (1968) ("H.R. Rep. No. 1711 On S.510").

between the Securities and Exchange Commission ("SEC"), then ably represented by its Chairman Manuel F. Cohen, and the securities industry during hearings before the Senate Subcommittee on Securities of the Senate Committee on Banking and Currency.

During these hearings, in the face of the industry's unanimous opposition to the SEC's desire to control the proration period by rule-making, Chairman Cohen moderated the SEC's position, declaring to the Subcommittee his view that the "basic suggestion [of the New York Stock Exchange ("NYSE") and the Investment Bankers Association ("IBA") calling for a fixed, statutory 10-day proration period] has considerable merit"

(Senate Hearings On S.510, p. 187). He then pointedly hypothesized the very situation posed in this case -- of possible acceptance of late-tendered shares to the detriment of timely tendering shareholders:

> MR. COHEN. But before I deal with that, I would like to refer to what the IBA said on this point this morning. They say, "This requirement" -- that is, the pro rata requirement -- "might deter certain holders from accepting the tender offer because those holding large blocks are often unwilling to have their holdings split into fractions and will sell only on an all-or-nothing basis. We suggest therefore that the period be limited to 10 days."
>
> That is, for the little shareholder it is pro rata, but the big fellow, who knows the score, waits for the 11th day, and has all his shares taken.
>
> The basic equity of that suggestion is something

> this committee will have to consider.
>
> * * * *
>
> Third, he [the tender offeror] may receive a sufficient number of shares during the initial period to encourage him to proceed and to sell more. We would have no objection to permitting him to provide that shares tendered during a subsequent period will be taken up on a first-come-first-served basis, provided that before doing so he takes up all of the shares tendered during the initial period or at least become obligated to do so, since by hypothesis the shares he received initially are fewer than the number the offeror really wants.
>
> I think this would deal with the problem that I discussed and that I believe exists in the suggestion made by the IBA and by the exchanges.

(Senate Hearings On S.510, p. 187; emphasis added).

In short, although the SEC continued to ask without ultimate

success for rule-making authority to establish the proration period,[7] Chairman Cohen emphasized that the SEC would accept the basic securities industry position on ten-day proration if there were assurance that the

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[7] To complete the saga of the SEC's bid for rule-making power to determine the length of the proration period, we note that Chairman Cohen's considerable influence on the Hill enabled him, in the House version of the bill (H.R. 14477), to restore the original version of S.510's proration provision, but with an amendment granting the SEC power to change the proration period. House Hearings On H.R. 14475 and S.510, p. 4. In those subcommittee hearings, the differences between the SEC and the securities industries were again highlighted by the testimony of Donald Calvin of the NYSE and Mr. Cohen before the House Subcommittee. Id. at p. 49-52. The industry view, as expressed earlier by Mr. Calvin to Senator Williams' Subcommittee, prevailed and the House adopted the Senate's amended version of S.510, rather than H.R. 14475.

timely tendering shareholders -- including "the little shareholder" -- were protected against dilution resulting from acceptance of late-tendered shares.

Speaking for the securities industry, the IBA gave the assurance requested by Chairman Cohen in its letter of April 19, 1967 to Senator Williams and the Subcommittee on Securities, in these terms:

> 2. Pro-Rata requirement limited to 10-days. The IBA and several other industry organizations recommended that subsection 5 of Section 2 be changed so that the prorationing requirement on tender offers apply only for 10 days. The chairman of the SEC referring to the IBA recommendation on this point, stated that its effect would be:
>
> "That is for the little shareholder it is pro rata, but for the big fellow, who

knows the score, he waits for the eleventh day, puts it all in, and has all the shares taken."

That would not be the effect of our proposal. We recommend that (a) where more securities are tendered during the first 10 days than the person making the tender offer proposed to take up, all of the securities taken up shall be taken pro rata from those tendered during the first 10 days unless the tender offer is increased to take a larger number of shares, in which case, remaining shares tendered during the first 10 days would have to be taken up before any shares subsequently tendered were taken; but (b) if the amount of securities tendered during the first 10 days does not exceed the amount which the person making the tender offer is willing to take up, all of the shares tendered to that date and thereafter may be taken up on a first-come-first-served basis

without prorationing. (Emphasis added.)

* * *

(i) If at the end of 10 days 150,000 shares have been tendered and an additional 50,000 shares are tendered during the following five days, under our proposal the person making the tender offer would accept 100,000 shares on a pro-rationed basis from the 150,000 shares which were tendered during the first 10 days. He would not be permitted to accept any of the 50,000 shares tendered during the following five days unless the tender offer was increased to take a larger number of shares, in which case he would be required to take up all of the shares tendered during the first 10 days before taking any of the shares tendered during the following five days.

* * * *

We hope that these additional comments will help clarify and resolve the issues for your Committee.

Senate (Hearings On S.510, pp. 245-46; emphasis added).

When Congress legislates against a background of such detailed consideration of the operation of a proposed, highly technical statute, this Court has felt bound by this persuasive evidence of Congressional intent. See, e.g., Dawson Chemical Co. v. Rohm and Haas Co., 448 U.S. 176, 204 (1980); National Wood Work Manufacturers Association v. N.L.R.B., 386 U.S. 612, 646 (1967). In the case of the Williams Act, the strength of this legislative history is amplified by virtue of the fact that the full Senate passed the Williams Act on the basis of the adjustments made to S.510 as a result of

the SEC/securities industry debate in the subcommittee hearings.[8]

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[8] The full Senate, in passing the bill S.510 on to the House of Representatives, was informed (in response to questions addressed by Senator Javits to its co-sponsors, Senators Williams and Kuchel) that the SEC and the securities industry were in agreement on the bill in the following colloquy (113 Cong. Rec. S24665, 90th Cong. 1st Sess. (August 30, 1967)):

> MR. JAVITS. I gather that it has the approval of the Securities and Exchange Commissions?
>
> MR. WILLIAMS of New Jersey. It had the across-the-board approval of the securities industry and, as the Senator from California has stated, the approval of the Securities and Exchange Commission as well as that of the stock exchanges.
>
> MR. JAVITS. It did receive the approval of the stock exchange? That is very important. Did that approval include the New York Stock Exchange and the

Neither in its petition to this Court nor in the Court of Appeals did USS dispute that this legislative history revealed a clear purpose to prohibit the acceptance of late-tendered shares on an oversubscribed, ten-day partial offer. USS's continuing emphasis on only that portion of §14(d)(6)'s legisla-

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American Stock Exchange?

MR. WILLIAMS of New Jersey. Yes, that is correct.

MR. KUCHEL. And the Pacific Coast Stock Exchange?

MR. JAVITS. The Pacific Coast Stock Exchanges, and other stock exchange?

MR. KUCHEL. That is correct.

MR. JAVITS. The bill, I gather, now goes to the House Of Representatives; is that correct?

MR. KUCHEL. That is right.

tive history which reflects Congress' intent to outlaw the "first come, first serve" partial tender offer is simply misdirected.

The legislative history forcefully documented, as the Court of Appeals correctly pointed out, the "nondiscrimination component" of the proration requirement (Pet. A-9). For example, Chairman Cohen explained that one of the objectives of the Williams Act was "to assure fair treatment of all shareholders who decide to accept a tender offer" by imposing "three substantive provisions designed to assure that all stockholders who tender their shares are treated fairly."[9] Senate

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[9] In addition to §14(d)(6), these provisions include Sec-

Hearings On S.510, p. 21. The SEC, during the Senate Subcommittee hearings, likewise noted that the proration requirement and cognate substantive safeguards of the Williams Act, were designed "to eliminate practices in connection with tender offers which may result in unfair discrimination among persons tendering their shares * * *." Senate Hearings on S. 510, p. 203 (emphasis added). Indeed, this Court recognized the "non-discrimination component" of

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tions 14(d)(5) and 14(d)(7) of the 1934 Act (15 U.S.C. §§78(d)(5), (7)). These latter provisions require that tendering shareholders be allowed a minimum period of time to withdraw their timely tendered shares and that early tendering shareholders be granted all increases in the tender offer price.

§14(d)(6) when it noted that the Williams Act's substantive provisions were designed to assure that target company shareholders would not be unfairly deprived of "the opportunity to sell shares for a premium over their market price." Edgar v. MITE Corp., 457 U.S. 624, 634 n.9 (1982) (emphasis added).

C. The Financial Community And Securities Bar Have Long Assumed The Correctness Of The Court Of Appeals' Reading Of §14(d)(6).

The securities bar's understanding that §14(d)(6) prevented the tender offeror's acceptance of late-tendered shares is typified by the following from Professor Bromberg's securities law text:

> Example 1: (Initial tenders exceed minimum; mini-

> mum taken up) The offer is for 800 shares and 1,000 are deposited (tendered) in the first ten days, and 100 later. If the offeror takes up only 800, it must take pro rata (80 percent) from each of the initial tenders, subject to rounding of fractions. Nothing will be taken from the later tenders. (Emphasis added.)

Bromberg, Securities Law: Fraud, S.E.C. Rule 10b-5, §6.3 (533) (1969)

Other securities law texts addressing the issue come to the same conclusion. See, e.g., H. Blumenthal, 1981 Securities Law Handbook, §20.02 at 215 (1981); Fogelson, "The Expanding Regulatory Framework of the Williams Act And Its Effect On Takeover Activities", in Proxy Contests and Battles for Corporate Control, §2.2.2.2 at 25-26 (PLI 1981).

When the importance of timely

tendering of shares arose during the USS/Mobil contest for Marathon, the financial press reported the similar understanding of the financial community that the tender offeror could not accept late-tendered shares. In a November 30, 1981 article describing this contest, The Wall Street Journal noted:

> The proration deadline of a partial tender offer establishes a preferential "pool" of stock to be purchased first under terms of the offer. If more than the target number of shares is tendered, then the offer would be satisfied entirely from this preferential pool, with purchases on a pro rata basis.

A similar contemporaneous explanation, found in M. Greenbaum, "Tips for Takeover Targets' Stockholders", Fortune Magazine, Dec. 28,

1981 at pp. 110-112, noted:

> Investors wanting cash must move swiftly. Although SEC rules specify that any tender offer must last at least 20 business days, shareholders may have only ten calendar days to get into the "proration pool." Being in the pool ensures target shareholders of getting cash for at least a portion of their stock. Frequently the cash part of the offer is oversubscribed: more shares are tendered for cash than the acquiring company sought. When that happens, the acquirer buys only part of the shares, treating stockholders in the pool equally. * * * * those who weren't in the pool will eventually have to take stock if they don't sell their shares in the market.

D. The Court Of Appeals' Reading Of §14(d)(6) Poses No Difficult Problems Of Case Management Or Any Intrusion Into State Contractual Interests.

USS's remaining argument (Pet., Point II-B at pp. 16-18) ignores the fact that litigation over major tender offers is already predominantly brought in the federal courts -- in part precisely because Congress has enacted comprehensive requirements and safeguards for tender offers (and for securities transactions generally).[10] The federal

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10 A few examples, out of many available from different circuits, include Piper v. Chris-Craft Industries, Inc., supra; Radol v. Thomas, supra; Osofsky v. Zipf, 645 F.2d 107, 113 (2d Cir. 1981); Chromalloy American Corp. v. Sun Chemical Corp., 611 F.2d 240, 249 n.19 (8th Cir. 1979); and Indiana National Bank v. Mobil Oil Corp., supra.

courts have determined factual questions in those cases, and decided such incidental questions of state law as are necessary, without perceptible difficulty. Such tender offer litigation appears to pose no unusual case management problems.

In any event, USS's reading of §14(d)(6) --which would permit a tender offeror to admit late-tendered shares into the proration pool -- presents the very same types of case management considerations that are presented by the Court of Appeals' reading of that provision.

Even if USS's reading of §14(d)(6) were correct, federal courts would obviously still be involved in cases dealing with the mechanics of tender offers regulated

by the Williams Act. In any case where the tendering plaintiff shareholder alleges a claim based on a failure of the tender offeror to "take up" shares "pro rata", the court would still have to consider, in the District Court's very own words, "what constitutes [a] valid tender under the terms of the offer, and whether all of the shares were validly tendered by the proration deadline." (Pet. B-13) Making such determinations is an inevitable consequence of according any private damage remedy under §14(d)(6), whether one accepts the Court of Appeals' or USS's reading of §14(d)(6)'s proration formula. There is nothing intrinsically unmanageable about such a fact-finding exercise.

USS's contentions about state law contract issues try to stand the proper federal priority on its head. This Court has, in a variety of contexts, held that, in the area of tender offers for public companies, the Williams Act imposes uniform national standards that preempt conflicting state law. See Edgar v. MITE Corp., 457 U.S. at 644; Sharon Steel Corporation v. Insurance Commissioner, 458 U.S. 1101 (1982). Here, Congress' documented purpose to prevent dilution of the proration pool through the acceptance of late-tendered shares is clear. As the Court of Appeals held, this federal priority takes precedence over imagined conflicts with suppositious state interests argued by USS (Pet. A-11, A-14).

Moreover, both federal interests and state interests, if any, are best served by litigating proration issues arising under §14(d)(6) in federal court. The alternative is at least two, or even multiple, separate class actions involving the same tender offer -- one in a federal court, and one or more additional suits in the state courts, with the concomitant proliferation of paper, trial time, effort and expense and risk of inconsistent or conflicting results. This would obviously tend to defeat Congress' intention to enact a comprehensive, uniform federal law for the protection of tendering shareholders of target companies involved in nationwide tender offers.

Indeed, insofar as respondent's claim is said to rest strictly

on state contract law, so pervasive is the federal interest here that this is probably one of those cases where federal "arising under" jurisdiction is appropriately invoked. See Merrell Dow Pharmaceuticals Inc. v. Thompson, ___ U.S. ___, 106 S. Ct. 3233, esp. 3236 n.12 (July 7, 1986).

In the end, however, the federal/state problem imagined by USS has not concretely arisen in this case. After four years of doing battle over the Williams Act issues, USS has yet to answer the complaint or respond to discovery aimed at determining under what circumstances late-tendered shares were accepted. USS's attempt to obtain Supreme Court review is merely a litigation tactic to impede this factual inquiry.

II. A PRIVATE DAMAGE REMEDY FOR VIOLATION OF §14(d)(6) WAS PROPERLY IMPLIED BY THE COURT OF APPEALS ON BEHALF OF TIMELY TENDERING SHAREHOLDERS OF THE TARGET COMPANY.

The Court of Appeals had little difficulty in finding a private damage remedy for violation of §14(d)(6)'s proration requirement. While the Court of Appeals made the standard four-prong Cort v. Ash[11] analysis, its conclusion might have rested as well on the following dictum in this Court's recent decision in Edgar v. MITE Corp., 457 U.S. at 644:

> The Illinois [anti-takeover] Act seeks to protect shareholders of a company subject to a tender offer by * * * according shareholders withdrawal, proration and equal consideration rights. However, the

[11] 422 U.S. 66 (1975).

> Williams Act provides these same substantive protections. . . . .. (Emphasis added.)

Thus, contrary to USS's semantic quibble (Pet., p. 9 n.5), this Court has noted that the "substantive protections" of §14(d)(6) are accorded in the form of substantive "rights" and the Court of Appeals correctly so concluded.

It is true that no specific provision was made in the Williams Act to enlarge the express private damage remedies available under the 1934 Act. The absence of such express provision in the Williams Act -- enacted in 1968 shortly after this Court's highwater mark on implied remedies in J.I. Case Co. v. Borak, 377 U.S. 426 (1964), and many years before retrenchment began in 1975

with Cort v. Ash -- hardly precludes implication of a private damage remedy in this case.

A. A Private Damage Remedy Was Properly Found In The Light Of The Language And Structure Of The Substantive Provisions Of The Williams Act And Their Legislative History.

Section 14(d)(6), in its straightforward text, identifies the protected plaintiff, i.e., "each depositor" of "securities" of which tender is made within the 10-day proration period. This plaintiff-identifying language, together with similar structure of the two other "substantive" provisions of the Williams Act, reflects an intent appearing "implicitly in [its] language [and] structure" to establish a dam-

age remedy. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S 11, 18 (1979).[12]

Indeed, in Cannon v. University of Chicago, 441 U.S 677, 690 n. 13 (1979), this Court noted that language clearly identifying a narrow plaintiff class would almost inevitably imply congressional intent to create a private remedy:[13]

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12 Sections 14(d)(5) and (d)(7) of the 1934 Act specifically identify the protected plaintiffs in the same fashion. Section 14(d)(5) identifies the "depositor" of securities as the person entitled to the withdrawal rights granted thereby, whereas Section 14(d)(7) identifies "each security holder whose securities are taken up," under the circumstances therein defined, as the person entitled to an increased price per share.

13 In this respect, §14(d)(6) is unlike other provisions of the 1934 Act or other securities laws whose violation has been

> . . . this Court has never refused to imply a cause of action where the language of the statute explicity conferred a right directly on a class of persons that included the plaintiff in the case.

The right-conferring nature of these "substantive" provisions is substantiated by the Williams Act's legislative history. In his crucial testimony already quoted, Chairman Cohen was explicit about the Senate bill's purpose to accord substantive rights to tendering shareholders:

> The bill in its present form contains three substantive provisions designed to assure that all stockholders who tender their shares are treated fairly.

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held not to create the private damage remedy sought. See, e.g., Piper v. Chris-Craft Industries, Inc. 430 U.S. 1 (1977); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

Senate Hearings on S.510, p. 21 (emphasis added).

Professor Hayes, who played a highly influential role in the Senate Subcommittee hearings, strongly endorsed the notion that tendering stockholders were to be accorded enforceable rights, in this colloquy with Senator Williams:

> MR. HAYES: * * * The two major protagonists -- the bidder and the defending management -- do not need any additional protection, in our opinion. They have the resources and the arsenal of moves and countermoves which can adequately protect their interests. Rather, the investor -- who is the subject of these entreaties of both major protagonists -- is the one who needs a more effective champion, and this is an important point.

Senate Hearings On S.510, p. 57 (emphasis added). Relating the need to champion the investor to the "sub-

stantive" provisions of S.510, he further stated:

> In conclusion, Professor Taussig and I fully support the intent of the Congress to give necessary and meaningful protection to the investor involved in a tender offer takeover bid.

Senate Hearings on S.510, p. 60 (emphasis added).

B. There Is Overwhelming Evidence That Congress Assumed That Timely Tendering Shareholders Would Have A Private Damage Remedy To Enforce The "Substantive" Provisions Of The Williams Act.

In Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), this Court considered the appropriateness of implied damage remedies by undertaking a sensitive and wide-ranging analysis of congressional action in "its contemporary

legal context", paying particular heed to Congress' understanding of contemporary "judicial decisions" finding implied remedies in similar circumstances (456 U.S. at 379).

The Court subsequently elaborated upon this methodology in a more recent decision concerning implied remedies in the securities field. In Daily Income Fund v. Fox, 464 U.S. 512, 104 S. Ct. 831, 838-840 (1984), Justice Brennan, speaking for a virtually unanimous court, described the search for "legislative intent" as involving a highly open-ended inquiry (104 S. Ct. at 839):

> That intent may in turn be discerned by examining a number of factors, including the legislative history and purpose of the statute, the identity of the class for whose particular benefit the statute was passed,

> the existence of express statutory remedies adequate to serve the legislative purpose and the traditional role of the states in affording the relief claimed.

Under the Merrill Lynch/Daily Income Fund analysis, the implication of a private damage remedy for tendering shareholders injured by deprivation of their proration rights under §14(d)(6) easily passes muster.

During the period 1965-1968, when the Williams Act was under legislative consideration,[14] this

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[14] Congress' work on the Williams Act began with an initial bill first submitted as S.2732 to the Senate in 1965 where it was not the subject of any hearings. See Comments of Senator Williams, 113 Cong. Rec. at S856 (January 18, 1967). In amended form, it was re-submitted in 1967 to the Senate by Senators Williams and Kuchel and was the subject of extensive hearings in 1967 and 1968 in Senate and

Court's 1964 decision in J.I. Case Co. v. Borak was the prevailing federal judicial authority on implied damage remedies under Section 14(a) of the 1934 Act, 15 U.S.C. §78n(a) (377 U.S. 430-33). Justice Clark, for a unanimous Court, wrote expansively of the federal courts' broad powers "'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded" (377 U.S. at 433). Most critically here, the Court unequivocally posited an implied damage remedy merely on the provisions of Section 27 of the 1934 Act (15 U.S.C. §78aa), which granted "exclusive jurisdiction" to federal district

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House Committees, as described above. In July, 1968, passage finally occurred.

courts over "all suits in equity and actions at law brought to enforce any liability or duty created by" the 1934 Act (377 U.S. at 433-34) (emphasis added).

The Eleventh Circuit recently noted, in upholding an implied right of action under the Williams Act for the target company, that Borak provided the "contemporary legal context" for implied remedies surrounding enactment of the Williams Act:

> Only four years before the passage of the Williams Act in 1968, the Supreme Court held that Section 14(a) of the Exchange Act permitted a shareholder to sue for damages on behalf of the corporation to redress injuries from false and misleading proxy solicitation materials distributed in violation of that provision. J.I. Case Co. v. Borak, 377 U.S. 426, 84 S. Ct. 1555, 12 L.Ed 2d 423 (1964). It could be

> argued that, given the Williams Act's origin in Section 14(a), Congress had ample reason to assume that the federal judiciary would imply certain private rights of action to enforce the newly enacted mandates. However, since Borak held that a stockholder had a private right of action, the fact that Congress might have intended to preserve this particular private remedy does not necessarily imply that Congress intended to preserve or create a remedy for the issuer corporation.

Florida Commercial Banks v. Culverhouse, 772 F.2d 1513, 1518 (11th Cir. 1985) (emphasis added).

Also noting this same "legal context" in his appearance before the Senate Subcommittee on Securities, Professor Carlos Israels confidently predicted as follows:

> Presumably we may assume that the Commission will be able to enforce the provisions of this Bill,

> if it is enacted, and of its rules thereunder by proceedings for injunction in the Federal courts; and that under J.I. Case Co. v. Borak, 77 U.S. 426 (1964) a private litigant could seek similar relief before or after the significant fact such as the acceptance of his tender of securities.

Senate Hearings on S.510, p. 67.

The legislative history also shows that Congress was specifically aware, during the House hearings, of the then ongoing major tender offer litigation which is described in Crane Company v. Westinghouse Air Brake Company, 419 F.2d 787 (2d Cir. 1969). This awareness is reflected in several articles brought to the attention of Chairman Cohen by Representative Moss (House Hearings on H.R. 14475 and S.510, pp. 22-23). In its opinion in Crane, the Second

Circuit applied J.I. Case Co. v. Borak to the question of remedies, holding that the plaintiff's "remedies may include damages, if any, prospective injunctive relief as well as appropriate retrospective relief . . ." (419 F.2d at 803). This holding clearly reflects the same understanding Congress must be credited with when it passed the Williams Act in 1968. As Judge Kaufman wrote soon thereafter: "The teachings of J.I. Case Co. v. Borak . . . are part of the ABC's of securities law." GAF Corporation v. Milstein, 453 F.2d 709, 719 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972).

C. The Asserted Conflict USS Purports To Find With Two Decisions Of This Court Is Non-Existent.

Running a retread of its argument before the Court of Appeals, USS argues that the Court of Appeals' approach to implied remedies "would have necessitated a different result" in Transamerica and Universities Research Association v. Coutu, 450 U.S. 754 (1980) (Pet., p. 10). These two cases -- which are the only implication cases on which USS now relies -- are easily distinguished.

Transamerica, contrary to USS's contention (Pet., p. 10), provides the analytical approach applied by the Court of Appeals. There, this Court noted that the "absence of anything in the legislative history that

indicates an intention to confer any private right of action . . . does not automatically undermine . . ." the existence of a private remedy and that such a remedy may be implied where, as here, such an intent to confer one "appear[s] implicitly in the language or structure of the statute, or in the circumstances of its enactment." (444 U.S. at 18; emphasis added).

In Transamerica, this Court implied a private injunctive remedy, but declined to imply a private damage remedy under the Investment Company Act. A key factor in its analysis, however, was the omission from the jurisdictional provisions of that Act of the remedy-creating language contained in Section 27 of the 1934

Act (quoted above) which this Court in J.I. Case Co. v. Borak found to create implied damage remedies (444 U.S. at 21-22). In finding that an injunctive remedy granted "the customary legal incidents of voidness, including the availability of a suit for rescission *** and for restitution," the Court found an effective means of enforcing the statutory safeguards. Here, by contrast, USS has not suggested any remedy for meaningful enforcement of §14(d)(6).

Coutu is even more inapposite to the present case. The plaintiff there failed nearly all of the Cort tests. This Court found an affirmative congressional intent to deny the private damage remedy proposed by plaintiff for implication because

that remedy would have conflicted with the elaborate administrative remedies provided by the statute. (450 U.S. at 770-73, 783-84).

In Coutu, plaintiffs sought to imply a private damage remedy under the Davis-Bacon Act, which provides minimum wage protection to employees of certain federal contractors, when the federal contract had not been determined, by the Davis-Bacon Act's mandated administrative procedure, to "call for Davis-Bacon work" (450 U.S. 756). The statutory scheme in question provided a three-step procedure to give rise to a private damage claim: (1) the contract had to have been determined by the Secretary of Labor to involve "Davis-Bacon work", (2) the contracting

agency was first to pay to the contractor's employees out of amounts due to the contractor any underpayment of wages, and (3) only when the administrative remedy failed to compensate the employee fully was the employee accorded a private damage remedy enforceable in a court proceeding (450 U.S. at 771-73). Under Davis-Bacon, Congress had established the detailed, three-phase procedure to permit federal contractors to be able to determine their project costs in advance of bidding (450 U.S. at 776). On the basis of the act's structure and legislative history, a unanimous Court found that to permit private litigants to circumvent the need for a prior administrative determination that Davis-Bacon wage floors were applicable would "defeat"

two important and articulated Congressional objectives (450 U.S. at 777) and, in the circumstances there presented, "would introduce substantial uncertainty into government contracting," causing "federal budgeting to be disrupted" (450 U.S. at 782-83).[15] This is a far cry from the situation here where no inconsistent remedies were set up and no operations of government are affected.

Finally, USS's broad-brush assertions that the Court of Appeals decision somehow will cause private damage remedies to be inferred in vast areas of law "such as wage stan-

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[15] The Court in Coutu also found that subsequent attempts to amend Davis-Bacon on the point in issue had been rejected by Congress (450 U.S. at 777-79).

dards, OSHA regulations, discrimination cases, food and drug cases, or environmental situations" is merely a ploy (Pet., p. 11). In the District Court and the Court of Appeals, USS argued that several cases in those areas of the law compelled the denial of a private damage remedy under §14(d)(6). These cases, however, were easily distinguished in our briefs in those courts. USS, now relying specifically only on two of the over twenty cases relied upon below, attempts to resurrect its reliance on these cases without citing them. This tactic merely illustrates the untenability of its position that the Court of Appeals made anything other than a traditional and proper application of the Cort v. Ash factors.

In short, USS's position on implied remedies for violations of §14(d)(6) would effectively relegate this statute and the cognate provisions of §§14(d)(5) and (7) -- providing withdrawal and equal consideration rights -- to "dead letter" status, rendering them enforceable only in after-the-fact cases by an SEC-sponsored injunction forbidding the tender offeror, which may never again be engaged in another tender offer, from violating the statute again. This Court's teaching on implied remedies was not intended to lead to such an absurd result.

CONCLUSION

USS's petition does not present any issue of public importance

meriting review by this Court. There is no conflicting authority or pending litigation, to our knowledge, that would be resolved by this Court's review of either of the Court of Appeals' two holdings. This case should be permitted, after four years of dilatory tactics by USS, to proceed to discovery and trial. The petition should be denied.

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Respectfully submitted,

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